2012 IL App (5th) 100132-U

NO. 5-10-0132

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

In re MARRIAGE OF	)	Appeal from the
	)	Circuit Court of
GEORGE M. EDWARDS,	)	Jefferson County.
	)	
Petitioner-Appellee and Cross-Appellant,	)	
	)	
and	)	No. 04-D-11
	)	
PENNY ATTAWAY, f/k/a	)	
PENNY ATTAWAY EDWARDS,	)	Honorable
	)	Barry L. Vaughan,
Respondent-Appellant and Cross-Appellee.	)	Judge, presiding.

JUSTICE STEWART delivered the judgment of the court.
Justices Welch and Chapman concurred in the judgment.

ORDER

¶ 1 *Held*: In this dissolution of the parties' marriage, the trial court's classification of marital and nonmarital property and its ruling that the wife dissipated marital assets are against the manifest weight of the evidence, and its division of marital property is an abuse of discretion. The trial court's failure to include the wife's business in either its classification or division of property is an abuse of discretion.

¶ 2 This appeal and cross-appeal is from a final judgment entered in the dissolution of the marriage of George Edwards and Penny Attaway, formerly known as Penny Attaway Edwards. The parties raise issues concerning the trial court's ruling that Penny dissipated marital assets and its classification and distribution of marital and nonmarital property. A bifurcated judgment of dissolution was entered on November 9, 2004. Beginning on October 4, 2006, the trial court began the hearing on all remaining issues, including custody of the parties' two minor children and all property issues. The trial on all remaining issues was

conducted over the course of the next 4½ months on 13 separate hearing dates. After the close of the evidence on February 23, 2007, the trial court allowed the parties to submit written closing arguments. After George filed the last of those closing arguments on April 12, 2007, the trial court held the case under advisement until October 29, 2008, an additional period of 17 months and 17 days, before entering a memorandum of decision that simply adopted George's proposed property division and his arguments regarding Penny's dissipation of assets. The parties then began filing motions requesting the court to clarify and/or reconsider the memorandum of decision, after which the trial court conducted another series of five separate days of hearings over the course of the next five months. After the last day of the hearings on the motions to reconsider, held on July 22, 2009, the trial court waited almost seven more months before entering an order on February 17, 2010, denying those motions. On March 17, 2010, the trial court entered a final order from which both parties have appealed. The facts we set forth herein are gleaned from the common law record and the various hearings. Where the evidence was disputed, we will acknowledge the nature of the dispute.

¶ 3 We are compelled to reverse the trial court's property disposition and remand this case for several reasons, including the trial court's failure to include the wife's business, Medical Services Unlimited, in its classification and distribution of the parties' remaining assets and debts.

¶ 4 BACKGROUND

¶ 5 The parties were married on December 15, 1996. At that time, Penny's minor daughter from a former marriage, Heather, was living with her in a home in Woodlawn, Illinois (the Woodlawn home), that Penny had purchased before the marriage. Also before the marriage, on February 1, 1996, Penny, a family nurse practitioner, opened Medical Services Unlimited, which she described as a health clinic, in Wayne City, Illinois. Before

the marriage, George inherited a house and 80 acres in Missouri (the Missouri home). The Missouri home was subject to a mortgage of $110,000 at the time of the marriage.

¶ 6 After the marriage, the parties continued to live in the Woodlawn home. On March 12, 1998, the parties' son, Larry, was born. On June 29, 1999, the parties purchased a house on Centralia Lake (the Centralia Lake home). Penny claimed that she paid for the house entirely from her nonmarital money. George disputed that claim. On December 22, 2000, the parties' daughter, Camille, was born. In March 2003, the parties mortgaged the Woodlawn home and used $85,000 from that mortgage to retire the mortgage on the Missouri home. The parties separated on January 19, 2004. On February 9, 2004, the court awarded temporary custody of Larry and Camille to Penny.[1] On November 9, 2004, the court entered a bifurcated judgment dissolving the parties' marriage and reserving ruling on all remaining issues. In that order, the court found that George was 35 years old and employed as a carpenter and that Penny was 45 years old and "employed as a nurse practitioner and owner of Medical Services Unlimited."

¶ 7 Between the November 2004 judgment of dissolution and the beginning of the trial on all remaining issues, the parties filed numerous pleadings, most of which are not pertinent to our resolution of this case. Among the relevant pretrial pleadings are motions filed by both parties claiming that the other was dissipating assets. Additionally, one month before the beginning of the hearing on all remaining issues, Penny filed a pleading entitled "List of Assets and Proposal for Property Division," in which she requested that the court award her all of the assets and debts associated with Medical Services Unlimited and that it order

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[1]We note that Penny was also awarded permanent custody of the children. George filed an appeal from the custody judgment, and this court entered an order severing the custody and visitation issues, assigning them to a separate, expedited appeal. However, George subsequently dismissed his appeal on the custody and visitation issues.

George to relinquish any and all present, past, and future interest in the business. By this time, Penny was representing herself, as she would continue to do throughout most of the remaining trial court proceedings.

¶ 8 EVIDENCE REGARDING MEDICAL SERVICES UNLIMITED

¶ 9 Penny operated two clinics under the name of Medical Services Unlimited, one in Wayne City that she opened before the marriage and another in Fairfield, Illinois, that she opened in July 2002. She claimed both Medical Services Unlimited clinics as her nonmarital property in pleadings and discovery. Penny testified that she rented buildings for both clinics. She operated Medical Services Unlimited as a sole proprietorship and did not pay herself a salary but merely took draws, paid bills, and made business purchases with funds from Medical Services Unlimited checking accounts (the South Pointe account, the Peoples National Bank account, and the Fairfield National Bank account). She also paid for household bills, for improvements to the marital residence, and for the personal expenses of herself and the children with funds from Medical Services Unlimited. Through lengthy testimony and numerous exhibits, it was established that Penny employed several people at the two clinics, contributed to individual retirement accounts (IRAs) for at least some of those employees, paid expenses for both clinics, and earned a substantial income from them. Most of the evidence about Medical Services Unlimited was focused on George's allegations of dissipation and Penny's defense against those accusations.

¶ 10 The court admitted the parties' income tax returns, including the Schedule C forms for Medical Services Unlimited for tax years 1998 through 2004. In 2004, Penny reported gross income from Medical Services Unlimited of $335,742, net income of $41,653, and depreciation of $27,488. However, neither party called an expert witness to testify about the assets, debts, operations, or value of either clinic, and neither party offered into evidence an appraisal of Medical Services Unlimited. Both parties referred to Medical Services

Unlimited in their testimony and in their closing arguments, but neither party complained when the trial court failed to include its assets or debts in either party's marital or nonmarital property award.

¶ 11 TRIAL COURT'S FINAL JUDGMENT

¶ 12 Because the record of the trial on the property issues is so voluminous, we will first set forth the trial court's March 17, 2010, final decision. In the final judgment, the trial court referred to its earlier decisions. The relevant portions of the final judgment are identical in substance to the October 28, 2008, memorandum of decision. The substance of the court's final judgment is as follows:

¶ 13 Nonmarital property assigned to George: a horse named Buster with tack, two quilts from his aunt, figurines from his mother, personal papers, and photographs of family and friends.

¶ 14 Nonmarital property awarded to Penny: her teacher's retirement pension valued at $40,000.

¶ 15 The court noted, as it had in the 2008 memorandum of decision, that the "remainder of the parties assets are marital either by being acquired during the marriage or no longer being maintained as a distinct identity, were commingled and thereby transmuted into marital assets." Presumably, from this finding, the trial court considered Medical Services Unlimited to be marital property, but it did not award it to either party.

¶ 16 Dissipation: "The court finds the Respondent [Penny] dissipated marital assets in the manner set forth in Petitioner's [George's] written closing argument submitted to the court [on April 12, 2007]. The court believes Respondent fails to understand the definition of marital property and wrongly believes income earned by her alone is non-marital property. Income earned during the marriage is marital income regardless of who earned it. Respondent treated her earnings and the assets of her medical business as her own personal

assets. The accounts of Medical Services Unlimited were treated as Respondent's personal account. The court finds the Respondent blatantly tried to hide and spend money to keep Petitioner from having access to the assets. In short, the court believes the Respondent acted in a manner accurately described by Petitioner in his written closing argument."

¶ 17 We note that in George's closing argument, upon which the trial court relies, he set forth several categories of Penny's expenditures from December 10, 2003, before the parties separated, through October 2004, totaling over $580,000 in alleged dissipation of marital assets. George requested the court offset that dissipation by ordering Penny to pay him $290,000 in addition to his share of the marital assets. The court did not comment on the specific allegations of dissipation, did not assign a dollar value to its finding of dissipation, and did not order an offset of the amount dissipated. The most we can gather from the order is that the court accepted George's argument that Penny dissipated $580,000 of marital assets.[2]

¶ 18 Marital property awarded to George: total value $503,150.19.[3]

Centralia Lake home–valued at $155,000

Missouri home and 80 acres–$225,000

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[2]We note that, in his closing argument, George listed expenditures he claimed were dissipation, the total of which is $939,613. George did not explain how he arrived at a figure of $580,000 as the total of Penny's dissipation. Nevertheless, since the trial court did not make a finding as to the amount dissipated and did not order any setoff, we do not attempt to address this discrepancy.

[3]We note that the correct sum of the property awarded to George is $516,650.19. The difference in the correct sum and the sum the trial court listed is $13,500. Apparently, both George and the trial court forgot to add the value of the 1992 Allegro Bay motor home awarded to George when computing the total value of George's marital property award.

Contents of the Centralia lake home–$10,000

1998 Dodge Ram pickup–$3,000

1997 Ford Escort–$1,000

Smith Barney Regular IRA in George's name–$4,172

Smith Barney Roth IRA in George's name–$13,220

Department 56 collection–$50,000

1992 Allegro Bay motor home–$13,500

John Deere tractor–$26,000

George's union pension–$8,758.19

2003 Harley Davidson motorcycle–$7,000

Bicycle, guns, tools–no assigned value

¶ 19 Marital debt assigned to George: total value $75,337.71

Illinois Department of Employment security–$2,450

Various credit cards–$72,887.71 (combined total)

¶ 20 George's assets minus debts (net total marital property award): $427,812.48[4]

¶ 21 Marital property awarded to Penny: total value $577,255

Woodlawn home–$221,000

Contents of Woodlawn home–$75,000

Baby grand piano–$16,000

Longaberger basket collection–$50,000

Sapphire angel collection–$20,000

Tupperware collection–$10,000

Lennox dishes collection–$15,000

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[4]Since the correct total of the marital assets awarded to George is $516,650.19, the correct net total marital property award is $441,312.48.

Pampered Chef collection–$5,000

2004 Lincoln automobile–$36,416

IRAs–$128,839

¶ 22 Marital debt assigned to Penny: total value $154,199

Mortgage on Woodlawn home–$80,000

Consolidated Bank of America loan–$50,000

Loan on Lincoln–$24,199

¶ 23 Penny's assets minus debts (net total marital property award): $423,056

¶ 24 The division of marital assets, including the list of property awarded, debts assigned, and the values assigned to the property, and the debts are identical to the list George provided to the court in the "Suggested Disposition" attachment to his April 12, 2007, closing argument. Somehow, George failed to list Medical Services Unlimited as either marital or nonmarital property in his Suggested Disposition. When the trial court adopted George's closing argument and his suggested property division, it too failed to list Medical Services Unlimited in its order. Neither party argued in their motions to reconsider and/or clarify that Medical Services Unlimited should be included in their property award, and neither party raises its absence from the property division in their briefs to this court.

¶ 25 STANDARD OF REVIEW

¶ 26 The Illinois Marriage and Dissolution of Marriage Act (the Act) (750 ILCS 5/101 to 802 (West 2010)) provides the rules for the classification and division of marital and nonmarital property. Section 503 defines marital and nonmarital property and directs the trial court to assign each party his or her nonmarital property and "divide the marital property without regard to marital misconduct in just proportions considering all relevant factors." 750 ILCS 5/503(d) (West 2010). "[P]rior to distributing property upon dissolution of marriage, the trial court must classify the property as marital or nonmarital." *In re Marriage*

of Demar, 385 Ill. App. 3d 837, 850, 897 N.E.2d 322, 333 (2008). On review, the court applies a manifest weight of the evidence standard to the trial court's classification of property as marital or nonmarital. *Id.* Likewise, review of the trial court's findings on dissipation and the valuation of marital and nonmarital property is considered under the manifest weight of the evidence standard of review. *In re Marriage of Hubbs*, 363 Ill. App. 3d 696, 699, 843 N.E.2d 478, 482 (2006). The trial court's decision is against the manifest weight of the evidence if the opposite conclusion is clearly evident or if the court's findings are unreasonable, arbitrary, or not based on the evidence. *In re Marriage of Heroy*, 385 Ill. App. 3d 640, 663, 895 N.E.2d 1025, 1047 (2008). However, because the trial court's decision on the ultimate division of marital property depends on its view of the facts in conjunction with the relevant statutory factors, review of the division of marital property is conducted under the abuse of discretion standard of review. *In re Marriage of Hubbs*, 363 Ill. App. 3d at 700, 843 N.E.2d at 483. An abuse of discretion occurs only when the trial court's ruling is arbitrary, fanciful, or unreasonable, or where no reasonable person would take the view adopted by the trial court. *In re Marriage of Hluska*, 2011 IL App (1st) 092636, ¶ 61, 961 N.E.2d 1247, 1259.

¶ 27 FAILURE TO INCLUDE MEDICAL SERVICES UNLIMITED IN DIVISION OF PROPERTY

¶ 28 Before we address the specific issues the parties raise, we are compelled to address the pivotal error that requires us to reverse and remand this case: the court's failure to classify Medical Services Unlimited as marital or nonmarital property and its failure to award that business to either party. Although neither party directly raises this issue, both parties claim on appeal that the division of property and debt is inequitable. Therefore, both parties have indirectly raised the issue by asking us to decide if the overall division of assets and debts is equitable.

¶ 29 The relevant factors listed in section 503 of the Act, which the court was required to consider in arriving at a property division in just proportions, include (1) each party's contribution to the acquisition, preservation, increase, or decrease in the value of the marital and nonmarital property; (2) each party's dissipation of the marital and nonmarital property; (3) the value of the property assigned to each spouse; (4) the duration of the marriage; (5) "the relevant economic circumstances of each spouse when the division of property is to become effective, including the desirability of awarding the family home *** to the spouse having custody of the children; *** (8) the age, health, station, occupation, amount and sources of income, vocational skills, employability, estate, liabilities, and needs of each of the parties; (9) the custodial provisions for any children; (10) whether the apportionment is in lieu of or in addition to maintenance; (11) the reasonable opportunity of each spouse for future acquisition of capital assets and income; and (12) the tax consequences of the property division upon the respective economic circumstances of the parties." 750 ILCS 5/503(d) (West 2010).

¶ 30 The requirements of section 503 of the Act are well-established.

> "Under the *** Act ***, a court must classify the property as either marital or nonmarital before it may dispose of property upon a dissolution of marriage. [Citation.] After classifying the property, the trial court gives to each spouse his or her nonmarital property, and the marital property is divided into 'just proportions.' [Citation.] In order to divide the marital property in just proportions, the trial court first must establish the value of the parties' marital and nonmarital assets. [Citation.] However, the Act does not require the court to place a specific value on each item of property." *In re Marriage of Hluska*, 2011 IL App (1st) at ¶ 61, 961 N.E.2d at 1259.

¶ 31 In the case before us, the trial court did not follow the directive of section 503. Although it conducted an evidentiary hearing over the course of 4½ months in which Penny's

business was a major part of the evidence, it failed to classify that asset nearly 2 years later when it adopted George's closing argument and suggested property distribution. Because the trial court did not adjudicate a major asset, its classification and valuation of assets and debts is against the manifest weight of the evidence. The evidence presented is not clear as to whether Medical Services Unlimited is Penny's nonmarital property, whether it is marital property, or whether it is part marital and part nonmarital, and there is insufficient evidence to establish the value of that business.

¶ 32 Section 503 of the Act defines nonmarital property, *inter alia*, as "property acquired before the marriage." 750 ILCS 5/503(a)(6) (West 2010). The evidence is undisputed that Penny opened Medical Services Unlimited before the marriage. However, she opened a second clinic at the Fairfield location during the marriage.

> "Section 503(b)(1) of the Act provides: '[A]ll property acquired by either spouse after the marriage and before a judgment of dissolution of marriage ***, including non-marital property transferred into some form of co-ownership between the spouses, is presumed to be marital property ***.' 750 ILCS 5/503(b)(1) (West 2004). The Act thus creates a rebuttable presumption that all property acquired after the date of the marriage is marital property regardless of the manner in which title is held. [Citations.] Accordingly, it is the burden of the party claiming that property acquired during the marriage is nonmarital to prove by clear and convincing evidence that the property falls within one of the exceptions listed in section 503(a) of the Act." *In re Marriage of Heroy*, 385 Ill. App. 3d at 670, 895 N.E.2d at 1052-53.

¶ 33 The evidence concerning Medical Services Unlimited's second location in Fairfield, which was acquired during the parties' marriage, is scant, although it does not appear that it was a separate business or legal entity. There was no evidence presented to show that Penny used any marital assets to acquire or maintain Medical Services Unlimited, that George was

involved with the day-to-day operations of the business, or that George had any ownership interest in it. However, the real problem is that neither party presented any evidence from which the court could determine the assets, liabilities, or accounts receivable of Medical Services Unlimited at either location. Thus, we cannot determine with any certainty whether Medical Services Unlimited is marital property, nonmarital property, or some combination of the two. All we can determine is that the trial court's failure to address this issue before dividing the parties' marital property amounts to an abuse of discretion.

¶ 34 We have found no case directly on point to guide our analysis of this unusual scenario. However, we have found several cases that support our conclusion that the trial court abused its discretion in failing to classify, determine value, or award Penny's business to either party. In the case of *In re Marriage of Rosen*, 126 Ill. App. 3d 766, 777, 467 N.E.2d 962, 969-70 (1984), the appellate court determined that the trial court had improperly classified a trust as a nonmarital asset with no attempt to determine the trust's present value and improperly characterized the income derived from the trust as nonmarital when it should have been classified as marital property. The court recognized that the "value of the non-marital assets is an important consideration in the apportionment of marital property [citation], and the failure of a trial court to determine the value of substantial assets can justify reversal." *Id.*, at 777, 467 N.E.2d at 970. The court reversed and remanded the case because "the complete dearth of evidence or findings concerning the terms and value of the trust, the nature of the proceeds therefrom, and the effects of these determinations upon other interests related to the dissolution rendered the property division arbitrary." *Id.*, at 777-78, 467 N.E.2d at 970.

¶ 35 The same rationale applies to the case before this court. Although the parties submitted some evidence of the income of Medical Services Unlimited, there is no evidence regarding its assets, debts, or fair market value. The complete dearth of evidence to show the fair market value of Medical Services Unlimited and the trial court's failure to determine

its effect on the other interests related to the dissolution renders the property division arbitrary. Although there is no requirement under the Act that the court place a specific value on each item of property, there must be competent evidence of the overall value of the parties' marital and nonmarital estates; otherwise, the reviewing court has no basis upon which to determine the propriety of the trial court's division of marital assets. *In re Marriage of Cuisance*, 115 Ill. App. 3d 551, 556, 450 N.E.2d 1302, 1306 (1983). See also *Olsher v. Olsher*, 78 Ill. App. 3d 627, 636, 397 N.E.2d 488, 495 (1979) (without evidence of the value of the stock of a closely held corporation, it was impossible for the trial court to divide the marital property in just proportions as required by section 503 of the Act); *In re Marriage of Morse*, 143 Ill. App. 3d 849, 856, 493 N.E.2d 1088, 1092-93 (1986) (the trial court's failure to assign any value to the stock of the wife's closely held corporation, when there was evidence that it had value, was against the manifest weight of the evidence and required remand); *In re Marriage of Douglas*, 195 Ill. App. 3d 1053, 1059, 552 N.E.2d 1346, 1350 (1990) (trial court's failure to make a determination as to the distribution of assets and allocation of $1 million marital debt was reversible error requiring remand); *In re Marriage of Kerman*, 253 Ill. App. 3d 492, 501, 624 N.E.2d 870, 876 (1993) (remand was required where the trial court assessed the value of a business without taking its debt into consideration and classified nonmarital stock as marital property); *In re Marriage of Schneider*, 214 Ill. 2d 152, 170-71, 824 N.E.2d 177, 187-88 (2005) (where the trial court failed to consider accounts receivable in valuing the husband's dental practice, remand was required because, in order to divide the marital property in just proportions, the "circuit court first must establish the value of the assets").

¶ 36 Therefore, in the case before us, it is clear that the trial court did not comply with the requirements of section 503 because it failed to classify Medical Services Unlimited, a substantial asset, as Penny's nonmarital property, as marital property, or as part marital and

part nonmarital property. Additionally, the court did not determine the fair market value of the business because there was insufficient evidence from which to make that determination. As a result, the trial court did not consider Medical Services Unlimited as part of a comprehensive property division, and it had no basis for determining if George's proposed property division, which it adopted almost verbatim, was in just proportions. The trial court's failure to include Medical Services Unlimited in its final judgment is a clear abuse of discretion requiring this case be remanded for further proceedings. We next consider the issues raised by the parties to determine which of those issues also require reconsideration on remand.

¶ 37 ISSUES RAISED BY THE PARTIES

¶ 38 CLASSIFICATION OF PROPERTY AND DEBT

¶ 39 Penny argues that the trial court erred in classifying the Woodlawn home, the Centralia Lake home, the 1992 Allegro Bay motor home, the 2003 Harley Davidson motorcycle, and the 1998 Dodge Ram pickup truck as marital property and that the court improperly classified the horse named Buster as George's nonmarital property. Penny also contends that the trial court erred in classifying the mortgage loan on the Woodlawn home as marital debt. George responds that the trial court ruled correctly on each of these issues.

¶ 40 Section 503(b)(1) of the Act provides: "For purposes of distribution of property pursuant to this Section, all property acquired by either spouse after the marriage and before a judgment of dissolution of marriage ***, including non-marital property transferred into some form of co-ownership between the spouses, is presumed to be marital property," regardless of how title is held. 750 ILCS 5/503(b)(1) (West 2010). We recognize the legislative preference, expressed in section 503, for the classification of property as marital. *In re Marriage of Berger*, 357 Ill. App. 3d 651, 660, 829 N.E.2d 879, 887 (2005). The presumption of marital property is overcome by a showing that the property was acquired by

a method listed in section 503(a).

> "The Act creates a rebuttable presumption that all property acquired after the date of the marriage, but before the entry of the judgment of dissolution, is marital property regardless of how title is held. [Citation.] In order to overcome this presumption, the party challenging it must present clear and convincing evidence that the property falls within one of the statutory exceptions listed in the Act." *In re Marriage of Wanstreet*, 364 Ill. App. 3d 729, 735, 847 N.E.2d 716, 721 (2006).

Because the classification of an asset as marital or nonmarital "rests largely in the determination of the credibility of the witnesses," the trial court's classification decisions will be overturned only if they are against the manifest weight of the evidence. *In re Marriage of Werries*, 247 Ill. App. 3d 639, 641, 616 N.E.2d 1379,1383 (1993). Where the parties do not agree on how the property is to be classified, the party claiming it as his or her nonmarital property typically provides some form of documentation or other corroborating evidence to support the assertion that it is nonmarital, since all of the parties' claims are subject to the trial court's credibility assessment.

¶ 41 During one of the hearing dates on the trial on all remaining issues, Penny asked the trial court if it was true, as George's attorney had stated, that the parties' property would be "considered marital unless proven otherwise." The court responded as follows:

> "Any property acquired or earned during the marriage is considered marital property unless it can be traced to non-marital assets or traced to a non-marital source, such as a gift or inheritance, those kinds of things, so if they [George and his attorney] show earned or acquired during the marriage, it will be up to you to show it's non-marital property. It's presumed marital unless there's a showing by you that it meets some exception."

Penny responded, "That won't be hard to do." Nevertheless, for most of the items she

claimed to be nonmarital, she did not present any other testimony or documentary evidence to support her claim.

¶ 42 The Woodlawn home and mortgage: The evidence is undisputed that Penny bought this home before her marriage to George and that the family lived in this home as the marital residence until their separation, after which Penny and the children remained at the Woodlawn home, and George moved to the Centralia Lake home. If this was the only evidence, the Woodlawn home would certainly be Penny's nonmarital property because she acquired it before the marriage. 750 ILCS 5/503(a)(6) (West 2010). Likewise, the Missouri home would be George's nonmarital property because he inherited it before the parties' marriage. However, it is also undisputed that the parties mortgaged the Woodlawn home in March 2003 in order to pay off the debt on the Missouri home. As part of this process, both parcels of real estate were placed into joint tenancy in both parties' names. The parties agreed that the reason for this transaction was to obtain a lower interest rate on the debt. The trial court found both the Missouri home and the Woodlawn home to be marital property. Neither party argues that the trial court erred in finding the Missouri home to be marital property. Therefore, Penny misstates the issue by confining it to whether the trial court erred in classifying the Woodlawn home as marital property. The real issue is whether the trial court's finding that *both* the Woodlawn home and the Missouri home are the parties' marital property is against the manifest weight of the evidence.

¶ 43 We find that the court's classification of both homes as marital property and the mortgage on the Woodlawn home as marital debt is not against the manifest weight of the evidence. "Even though property might be considered nonmarital under section 503(a) [citation], courts will presume a spouse who placed nonmarital property in joint tenancy with the other spouse intended to make a gift to the marital estate." *In re Marriage of Berger*, 357 Ill. App. 3d at 660, 829 N.E.2d at 887. In the case at bar, this presumption applies to both

spouses as they each transferred their nonmarital real estate into joint tenancy. Any doubts as to the proper classification of the property are resolved in favor of finding that it is marital property. *Id.*

¶ 44 Penny argues that there was "never any donative intent on [her] part in executing the deed into joint tenancy of the Woodlawn home." She does not explain how we should find that George intended for his nonmarital real estate to become marital property but Penny did not, even though both parcels of real estate were transferred into joint tenancy in the same transaction and for the same reason. Neither party testified that they did not intend to make a gift of their nonmarital property to the marital estate. Since there was no evidence either way about the donative intent of either party, the legislative preference for finding property to be marital applies. See *In re Marriage of Wojcik*, 362 Ill. App. 3d 144, 154-55, 838 N.E.2d 282, 292 (2005) ("Any doubts as to the nature of the property are resolved in favor of finding that the property is marital."). The record does not support Penny's claim that the Woodlawn home is nonmarital property, and the manifest weight of the evidence supports the trial court's finding that both the Woodlawn home and the Missouri home are marital property and that the mortgage on the Woodlawn home is marital debt.

¶ 45 The Centralia Lake home: The parties purchased this residence on June 29, 1999. Penny argues that, although the Centralia Lake home was acquired during the marriage and placed into joint tenancy between the parties, she overcame the presumption that it is marital property because she testified that she paid for it with nonmarital funds. She testified that she did not intend to convey a gift to George or to the marital estate. George testified that the purchase price was $149,000 and that they paid $6,000 for a dock. However, he did not know the source of the funds used for those purchases. Penny testified that she would present documentation to show the source of those funds, but the documents submitted did not show that she purchased the property with her nonmarital money. She also testified at

various times that she planned to call her broker to testify about her investment accounts, but she did not call him as a witness.

¶ 46 There are several documents in the record that shed some light on this issue, although none that actually support Penny's argument. There are records of Penny's previous divorces showing that she was awarded real estate in Nevada and California. Penny testified that she sold both of those homes, and she showed that the funds from both of those sales were deposited in 1997 into a savings account in her name only that she had opened before her marriage to George. Penny testified and the passbook from that nonmarital savings account shows that she deposited $97,349.40 from the sale of a house in Nevada on January 31, 1997, that she withdrew $73,650 and transferred that amount to a Smith Barney account on February 20, 1997, and on the same day, that she withdrew $30,000 and transferred it to a treasury trend account. The passbook also shows that, on March 3, 1997, Penny deposited $80,435.55 from the sale of a house in California, and on April 21, 1997, she withdrew $70,000 and transferred it to a treasury trend account, and on April 29, 1997, she withdrew $10,000 and transferred it to a treasury trend account. During the trial on all remaining issues, Penny did not remember anything about the treasury trend account. During one of the hearings on the parties' posttrial motions, Penny testified that she thought the treasury trend account was a high-yield CD from which she could write a small number of checks, but she had no records from that account. Many records from various Smith Barney accounts were admitted into evidence, but the earliest Smith Barney records are from 1999. There is nothing in the record to show where the money from the sale of Penny's nonmarital real estate in Nevada and California went or how it was spent. More importantly, there is nothing in the record besides Penny's testimony to show the source of the funds used to purchase the Centralia Lake home, and Penny did not remember the specific source of the funds used to purchase that home other than her recollection that she used nonmarital cash to pay for it.

¶ 47 For all of these reasons, the trial court's finding that the Centralia Lake home is marital property is not against the manifest weight of the evidence. It is property acquired subsequent to the marriage and placed into joint tenancy between the parties, and the record is not clear that the money used for its purchase was Penny's nonmarital property. See *In re Marriage of Wojcik*, 362 Ill. App. 3d at 155, 838 N.E.2d at 292 (where husband placed nonmarital funds into marital accounts and produced no documentary evidence to show that the specific nonmarital funds were segregated before being used to purchase a motorcycle during the marriage, husband failed to overcome the presumption that the motorcycle was marital property).

¶ 48 1992 Allegro Bay motor home: This motor home was purchased during the marriage, on April 28, 2003, and was used for a family vacation to Disney World in December 2003. Penny testified that she paid for it with nonmarital cash, but she presented no documentation to show the source of those funds. On January 14, 2004, five days before the parties separated, she transferred the title to a trust along with other property that she considered to be her nonmarital property. Since the motor home was purchased during the marriage, Penny's testimony that she paid for it with unidentified nonmarital funds falls far short of the clear and convincing evidence necessary to overcome the presumption that it is marital property. *In re Marriage of Wanstreet*, 364 Ill. App. 3d at 735, 847 N.E.2d at 721.

¶ 49 2003 Harley Davidson motorcycle: Penny purchased a new 2003 Harley Davidson motorcycle on April 23, 2003, and she titled it in her name only. She testified: "[J]ust because I bought it during the marriage does not make it marital property. I can show clearly that the money came from nonmarital funds to purchase it." However, she did not present any evidence to show the source of the funds used to purchase this motorcycle. On January 26, 2004, after the parties separated, she placed the title in the name of her trust that she created in 2004. Penny presented no evidence to rebut the presumption that the motorcycle

is marital property, and there is sufficient evidence to support the trial court's finding that it is marital property.

¶ 50 1998 Dodge Ram pickup truck: Penny argues that this pickup truck is her nonmarital property because she testified that she paid cash for it on October 13, 1998, with nonmarital funds. The truck was titled in Penny's name only, and she listed it as an asset of the trust she created in January 2004. Just as with her other claims of nonmarital property, she did not present clear and convincing evidence that the money she used to purchase the truck was nonmarital. Her testimony that she paid for it with cash that was nonmarital might be sufficient if the trial court had believed her, but it obviously did not. Under these circumstances, we cannot say that the trial court's ruling was against the manifest weight of the evidence because the court was not required to accept her testimony without any documentary proof to corroborate it.

¶ 51 Horse named Buster: The trial court awarded "a horse named Buster with tack" to George as his nonmarital property. On appeal, Penny claims that the horse is rightfully her nonmarital property, and George responds that the horse is rightfully his nonmarital property. This is so even though Penny alleged (in two pleadings she filed after the court entered its memorandum of decision in October 2008) that Buster had been "sold several months ago for $300 with tack." Neither party explains this discrepancy in this court.

¶ 52 Penny testified that she purchased Buster, whose registered name is Padre Yogi, on October 14, 1996, two months before the parties' marriage. The trial court admitted into evidence the certificate of registration showing that Penny was the registered owner of Padre Yogi on October 14, 1996. George testified that he used some of the money he inherited from his father's death to pay for Buster, but he did not explain why Penny was listed as the registered owner. Therefore, the trial court's finding that the horse named Buster was George's nonmarital property is against the manifest weight of the evidence. If not already

sold, the horse named Buster is Penny's nonmarital property. We express no opinion about the tack that was to go with the horse because neither party claims it.

¶ 53 DISSIPATION OF ASSETS

¶ 54 Most of the evidence presented to the trial court was focused on George's allegations that Penny had dissipated vast sums of money. Likewise, both parties' briefs to this court also highlight the issue of Penny's dissipation. Our review of this issue is hampered somewhat by the trial court's failure to make findings regarding George's arguments about specific expenditures that he claimed to be dissipation. Nevertheless, from the trial court's order, we can reasonably surmise that the court accepted each and every one of George's arguments and his conclusion that Penny dissipated $580,000 in assets. Since this case must be remanded, we briefly set forth the evidence on each item George claimed to be dissipated and our ruling as to whether the court properly found that item to be dissipated.

¶ 55 Section 503 of the Act directs the trial court to consider dissipation as one of the factors in dividing the parties' marital property. 750 ILCS 5/503(d)(2) (West 2010) ("In a proceeding for dissolution of marriage ***, the court *** shall divide the marital property without regard to marital misconduct in just proportions considering all relevant factors, including: *** (2) the dissipation by each party of the marital or non-marital property[.]"). The term dissipation generally refers to the use of marital property for the sole benefit of one of the spouses for a purpose unrelated to the marriage at a time when the marriage is undergoing an irreconcilable breakdown. *In re Marriage of O'Neill*, 138 Ill. 2d 487, 496, 563 N.E.2d 494, 498-99 (1990). Whether a particular course of conduct amounts to dissipation depends on the unique facts of each case. *In re Marriage of Blunda*, 299 Ill. App. 3d 855, 864, 702 N.E.2d 993, 999 (1998). The spouse charging dissipation against the other spouse must make a preliminary showing of dissipation before the burden shifts to the spouse charged with dissipation to refute the accusations. *In re Marriage of Manker*, 375 Ill. App.

3d 465, 477, 874 N.E.2d 880, 890 (2007). Once a *prima facie* case for dissipation has been made, the burden shifts to the party charged with dissipation to prove by clear and specific evidence how the funds were spent. *Id.* "The explanation given by the spouse charged with dissipation as to how funds were spent requires the trial court to determine his or her credibility." *In re Marriage of Blunda*, 299 Ill. App. 3d at 864, 702 N.E.2d at 999. The trial court's findings on dissipation of assets and the valuation of marital property are reviewed under the manifest weight of the evidence standard because those issues "are generally factual determinations." *In re Marriage of Hubbs*, 363 Ill. App. 3d 696, 699-700, 843 N.E.2d 478, 482-83 (2006).

¶ 56 Use of marital funds for legitimate living expenses is not a dissipation of assets. *In re Marriage of Zweig*, 343 Ill. App. 3d 590, 596, 798 N.E.2d 1223, 1229 (2003). That is an especially important consideration in cases such as this, where the trial court proceedings occur over periods of years; otherwise, every time a spouse charged with dissipation paid a bill or made any purchase, he or she would have the " 'burden of showing, by clear and specific evidence, how the marital funds were spent,' " and " '[g]eneral and vague statements that the funds were spent on marital expenses or to pay bills' " would be inadequate to avoid a finding of dissipation. *Id.* (quoting *In re Marriage of Tietz*, 238 Ill. App. 3d 965, 983, 605 N.E.2d 670, 683 (2003), and *In re Marriage of Petrovich*, 154 Ill. App. 3d 881, 886, 507 N.E.2d 207, 210 (2003)). In *In re Marriage of Miller*, 342 Ill. App. 3d 988, 796 N.E.2d 135 (2003), this court noted:

> "Dissipation contemplates a diminution in the marital estate's value due to a spouse's actions. Although a spouse may not necessarily derive a personal benefit from the acts that constitute dissipation [citation], expenditures that form the basis for dissipation should have some detrimental effect upon the marital estate. ***
>
> The concept of dissipation is premised upon waste. If a spouse's actions do not

squander the marital estate's value, that spouse's actions do not constitute dissipation." *In re Marriage of Miller*, 342 Ill. App. 3d at 994, 796 N.E.2d at 141.

Therefore, just as we exclude expenditures for legitimate living expenses, we should also exclude those expenditures that do not diminish the value of the marital estate. With these principles in mind, we review George's allegations of dissipation to decide if the trial court should consider them on remand as part of its overall property division.

¶ 57 In his closing argument, which the trial court adopted, George argued that, although Penny had spent in excess of $200,000 on improvements to the Woodlawn home, those improvements only increased the value of the home by $66,000. George asserted that Penny's expenditures on the Woodlawn home allowed her to spend money that he can never directly recoup. Penny testified in detail that the improvements included a pole barn that she had constructed to house the parties' motor home; a horse barn with an indoor riding arena and extra living quarters; repairs and improvements to the house, such as new cabinets, countertops, and flooring; and repairs to the real estate, such as new fencing. Penny explained why she made each improvement or repair and how she and the children used and enjoyed them. The Woodlawn home was the parties' marital residence, where Penny and all three children continued to live during the lengthy dissolution proceedings. Penny's expenditures for the improvement and repairs to the former marital residence should have been considered in the value of that residence, they do not constitute dissipation, and the trial court should not take these expenditures into account as dissipation on remand.

¶ 58 George also claimed that many of Penny's purchases amounted to dissipation. George claimed the following purchases as dissipation: $4,071.82 to Victoria's Secret, $6,000 for a Jet Ski for Heather and a four-wheeler for Larry, $5,300 for a horse trailer, unlisted amounts for a tiller and a dirt bike, and $635 per month to lease a pickup truck. Penny testified that she purchased clothing, hose, and underwear from Victoria's Secret for herself and Heather.

She testified that the Jet Ski, four-wheeler, and dirt bike were gifts for the children, who used them for recreation. She testified about her need for the horse trailer, the tiller, and the pickup truck. George presented no evidence to contradict Penny's testimony that these were legitimate family expenditures consistent with their standard of living while she and George lived together and useful and/or enjoyable family possessions. The trial court should not consider these expenditures to be dissipation on remand.

¶ 59 George also claimed that Penny dissipated $26,000 when she purchased a new John Deere tractor. The trial court accepted George's proposed property division and awarded that tractor to George as part of his share of the marital property, assigning a value of $26,000 to the tractor. Not only did George fail to show that the purchase amounted to dissipation, he certainly failed to show that the marital estate was diminished in any way by the purchase since the tractor was awarded to him. The trial court should not consider the purchase of the John Deere tractor as dissipation on remand.

¶ 60 In his closing argument, which the trial court adopted in concluding that Penny had dissipated assets, George also argued that Penny had dissipated funds from her Smith Barney investment account and had improperly contributed to various IRAs. We disagree. Penny explained in great detail the reasons for these expenditures. They were either for legitimate living and household expenses for herself and the children or they were contributions to IRAs that had been similarly funded during the marriage.

¶ 61 There were, however, 15 checks written for cash after the parties separated. Penny had no explanation for these expenditures totaling $124,727. Penny wrote these checks between January 20 and August 17, 2004, after the parties' separation and during the time that the trial court found the marriage to be undergoing an irreconcilable breakdown. On remand, the trial court may choose to classify these expenditures as dissipation by Penny in its overall division of property.

¶ 62 Penny argues that the trial court failed to rule on her claim that George dissipated assets by allowing his mother to live in the Missouri home without paying any rent. The record establishes that, during the marriage, the parties rented the Missouri home for $800 per month at least until January 2003. George's mother moved into the Missouri home in April 2004 and lived there rent-free during the trial court proceedings. George paid the real estate taxes and paid for all necessary repairs and maintenance for the Missouri home. His mother paid only the electric bill. Penny testified that, after the parties' separation, she had renters available to move into the Missouri home but could not finalize the deal because George's mother was living there. George had no explanation for why his mother was living in the Missouri home without paying rent. Under these circumstances, Penny made a *prima facie* case that George dissipated assets by allowing his mother to live rent-free in a home that was formerly rented for $800 per month, and George failed to rebut that claim. On remand, the trial court may consider the number of months during which George's mother lived in the Missouri home to constitute dissipation.

¶ 63 TRIAL COURT'S ADDITIONAL OMISSIONS

¶ 64 Penny argues that the trial court erred in omitting certain property and debt in its property division. As we have already stated, neither she nor George raised the issue concerning the trial court's failure to include Medical Services Unlimited in its property division. Penny contends that the court failed to account for assets in George's possession, including items she alleged he had removed from the Woodlawn home, the contents of the Missouri home, Penny's nonmarital items located at the Centralia Lake home, three tractors (these are in addition to the John Deere tractor the court awarded to George), several four-wheelers and "ride-on vehicles" that George listed in his financial affidavit, and certain collectibles. Penny also argues that the court failed to account for some of the debt she listed on her financial affidavit. Penny is correct that none of the items she lists in this part of her

argument are specified in the trial court's final judgment. However, the items Penny lists appear to have been awarded to one of the parties (as included in the contents of one of the homes), sold during the course of the trial court proceedings, or are already in Penny's possession, all of which was part of the evidence presented to the trial court during the 4½-month hearing on all remaining issues or during the posttrial proceedings. Since this case must be remanded for the court to classify, assign value to, and consider Medical Services Unlimited in its overall property division, we also instruct the trial court to consider whether any additional property or debts should be included in its overall property division.

¶ 65 PROCEDURE ON REMAND

¶ 66 As this case must be remanded for further proceedings, we feel compelled to briefly discuss the procedure employed by the trial court during trial and posttrial proceedings. The trial of this case was conducted in 13 separate hearings over a period of 4½ months. Likewise, posttrial proceedings were conducted in five separate hearings over a period of five months. A trial or hearing should rarely be divided into separate proceedings. Doing so only prolongs the proceedings, provides the parties with multiple opportunities to present the same or similar evidence, and severely tests the memory of the trier of fact. Except in rare circumstances, once a trial or hearing is commenced, it should be tried to a conclusion in consecutive days that a court is in session. Further, we find no justification in the record for the court to have had the decision in this case under advisement for nearly 18 months, and to then simply adopt completely the proposed property disposition of one of the parties. On remand, as discussed below, this cause must be assigned to a different judge. We trust that the trial court will then provide the parties with a more prompt disposition of this case.

¶ 67 We also cannot ignore certain statements made by the trial court in its February 17, 2010, written order denying both parties' motions to reconsider. One of the issues presented was whether George should be awarded attorney fees. The trial court wrote:

"The only issue the court was tempted to reconsider is the argument made by Petitioner that he should have had his attorney fees paid by the Respondent. However, the Petitioner was given considerable assets including a home and 80 acre farm in Missouri, and a home in Illinois. *While this case was pending, the Petitioner placed ads in newspapers throughout the twelve counties of the Second Judicial Circuit urging that the presiding judge (Judge Vaughan) not be retained. While the court did not hold the Petitioner in contempt for his actions, and did not hold the behavior against the Petitioner, it is difficult to accept the argument that Petitioner lacked sufficient funds to pay his attorney while he was making a large purchase of newspaper ads in twelve counties*. The court previously found each party should be responsible for their own attorney fees and the motion to reconsider that finding is DENIED." (Emphasis added.)

In our view, it is improper for a judge to consider a fact outside of the record, that a party spent funds campaigning against him for retention, in determining financial issues in a dissolution case. Since this statement might be viewed as showing bias, we direct, upon remand, that the chief judge of the Second Judicial Circuit assign this case to another judge.

¶ 68 CONCLUSION

¶ 69 For the foregoing reasons, we reverse the trial court's judgment entered on March 17, 2010, and we remand for further proceedings consistent with the judgment of this court. On remand, the court is to (1) classify and determine the value of Medical Services Unlimited, (2) reclassify the horse named Buster as Penny's nonmarital property, (3) consider whether additional property or debts should be included as either party's marital or nonmarital property or debt, (4) consider $124,727 in assets dissipated by Penny and determine and consider the total monetary value of George's dissipation for the rental value of the Missouri home, (5) consider all of the factors listed in section 503(d) of the Act in order to arrive at

a comprehensive division of the parties' marital property "in just proportions," and (6) redetermine any additional financial issues dependent upon the division of property.

¶ 70 Reversed; cause remanded with directions.